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Federal Communications Commission
Office of Secretary

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March 2, 2006

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VIA ELECTRONIC DELIVERY

DOCKET FILE COPY

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ORIGINAL

Re: *Ex Parte* Presentation in MB Docket No. 05-192, Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor to Comcast Corporation, Transferee

Dear Ms. Dortch:

Pursuant to the First and Second Protective Orders in this proceeding, Time Warner Inc. ("Time Warner") hereby provides its public version of its response to certain follow-up questions posed by the Media Bureau staff on February 22, 2006 regarding information provided in response to the Commission's Information and Document Request dated December 5, 2005.¹ As this is the public version, confidential and highly confidential information has been redacted from the text of this letter, and the exhibits, all of which contain highly confidential information, have been omitted. As required under the First and Second Protective Orders, one copy of the unredacted version of this letter has been filed under seal with the Secretary's Office, and a copy has been delivered to both Brenda Lewis and Julie Salovaara of the Media Bureau. The unredacted version of this letter will also will serve as Time Warner's response to certain assertions made by DIRECTV, Inc. ("DirecTV") in two separate letters dated February 14, 2006.²

¹ Letter from Donna C. Gregg, Chief, Media Bureau, to Steven N. Teplitz, et al., Time Warner Inc., dated December 5, 2005 ("Information Request").

² Letter from William M. Wiltshire, Counsel for DirecTV, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated February 14, 2006 ("DirecTV Letter I"); Letter from William M. Wiltshire,

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SUBJECT TO PROTECTIVE ORDER AND SECOND
PROTECTIVE ORDER IN MB DOCKET NO. 05-192
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

1. Charlotte Bobcats

Question III.E. of the December 5, 2005 Information Request called for information relating to rights held to distribute certain sports events that are not currently distributed on an attributable Sports Programming Network. In response, Time Warner reported that Time Warner Cable Inc. ("TWC") holds the exclusive right to distribute certain Charlotte Bobcats basketball games within the areas served by its cable systems in North Carolina and South Carolina. More specifically, TWC has the rights to [REDACTED] Bobcats' games during the 2005-2006 season. In Charlotte and Raleigh, TWC carries the Bobcats' games on a local origination channel (News 14), which is on the basic tier; in Greensboro, the games run on a part-time expanded basic tier channel (channel 78); and on TWC's systems in South Carolina, the games are carried on a part-time digital sports tier channel (channel 148).³ As indicated, TWC's exclusive rights are limited to areas served by its systems; there are no contractual restrictions preventing other MVPDs serving North and South Carolina from carrying Charlotte Bobcats games outside of those areas. At least one other MVPD has entered into an agreement to carry Bobcats' games.⁴

DirecTV has complained that Time Warner's document production did not include "its final agreements for the RSNs in... the Carolinas."⁵ However, this complaint is entirely misplaced. Question III.E of the Commission's Information Request regarding sports rights held by Time Warner did not request the production of any documents. Only Question III.J, which pertained to TWC's launch of new Sports Programming Networks, requested the production of documents and the Bobcats are not carried on a Sports Programming Network as that term is defined in the Information Request. With respect to TWC's carriage of C-SET, a Sports Programming Network that featured the Bobcats during the 2004-2005 season, no document production was required because (i) C-SET had ceased operation by the date of the Information Request and (ii) Time Warner had no ownership interest in or responsibility for the creation and launch of C-SET.

DirecTV also attempts to link TWC's carriage of C-SET to the so-called "terrestrial loophole," pointing to an internal TWC e-mail wherein it was acknowledged that the previous draft of the affiliation agreement between TWC and C-SET had contained a provision requiring the network to be terrestrially delivered.⁶ The implication in DirecTV's letter is that TWC wanted the channel to be delivered terrestrially so it could avoid the prohibition on exclusive agreements applicable to satellite-delivered signals. The problem with DirecTV's argument is

Counsel for DirecTV, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated February 14, 2006 ("DirecTV Letter II").

³ http://www.nba.com/bobcats/Bobcats_Broadcasting-128276-443.html.

⁴ http://www.nba.com/bobcats/release_comporium_051104.html.

⁵ DirecTV Letter II at 2.

⁶ DirecTV Letter I at 7.

that while the previous draft (prepared by TWC) did include a terrestrial delivery provision, it also expressly provided that TWC's carriage rights would be non-exclusive.⁷ In other words, the suggestion that TWC was seeking to take advantage of the so-called "terrestrial loophole" is utterly without basis since TWC's own draft of the agreement called for a non-exclusive contract. In any event, it was never contemplated that Time Warner, or to Time Warner's knowledge any other cable operator, would hold any ownership in C-SET, so applicability of the program access rules was simply never an issue. Any discussion regarding terrestrial delivery was only about the most commercially efficient way to distribute the service, nothing else.

Finally, DirecTV has attempted to connect the indisputably lawful agreement between C-SET and TWC to the Adelphia transaction by

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Again, the facts do not support DirecTV's speculative assertions.

It is quite clear that the Adelphia transactions (which will result in only a small increase in the number of subscribers served by TWC in the Carolinas) had absolutely no relationship to the agreement between C-SET and TWC. In fact, at the time TWC and C-SET announced their affiliation agreement in early March 2004, Adelphia's publicly-stated position was that it planned to emerge from bankruptcy as a stand-alone entity.⁸ It was not until late April 2004, well after the date of the e-mail cited by DirecTV, that Adelphia announced that it was exploring the possible sale of the company.⁹

In short, DirecTV's attempt to cast TWC's carriage of certain Charlotte Bobcats' games in a negative light is undercut both by the fact that TWC's suggestion for terrestrial delivery was coupled with its proposal for non-exclusive carriage and by the fact that the limited nature of the exclusivity offered to TWC by the Bobcats has consistently left the door open for DirecTV and other MVPDs to provide the channel to hundreds of thousands of households in North and South Carolina served by other cable operators, including Cox, Charter, Mediacom, Cebridge and, of course, until the transactions are consummated, Adelphia. Yet, to the best of our knowledge, DirecTV never made any attempt to affiliate with C-SET and has not sought the rights to any Bobcats games since the demise of C-SET.

⁷ Doc. Set F1, No. FCC eTW 00003123.

⁸ See Applications and Public Interest Statement, MB Docket No. 05-192, May 18, 2005 at 8 (noting that on February 25, 2004, Adelphia announced that it planned to emerge from bankruptcy as a stand-alone entity).

⁹ See Press Release, *Adelphia to Explore Possible Sale of Company as Part of Chapter 11 Process*, (April 22, 2004), available at http://www.adelphia.com/pdf/Adelphia_Sale_Release_Final.pdf.

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2. Cleveland Indians

Time Warner's response to the FCC Information Request did not include a copy of the final affiliation agreement between TWC and the Cleveland Indians' new Sports Programming Network because it was entered into after the time period covered by the Information Request. In addition, it is unclear that Time Warner was required to produce any documents relating to this new channel since Time Warner does not have any ownership in the channel and was not responsible for the creation and launch of the channel. Nonetheless, a copy of the final version of the affiliation agreement between TWC and Fastball Sports Productions LLC ("Fastball") for the carriage of this new channel (to be known as SportsTime Ohio) is attached hereto and is being submitted pursuant to the Second Protective Order in this proceeding.

Time Warner would like to emphasize certain key points relating to this agreement. First, not only does Time Warner have no ownership interest in SportsTime Ohio, Time Warner understands that the channel will be delivered via satellite, thus repudiating unsubstantiated claims by DirecTV of a "trend" towards terrestrial delivery of new RSNs. Second, TWC's rights under this affiliation agreement are non-exclusive. Time Warner understands that Fastball intends to actively market this service to all MVPDs within the Cleveland Indians' territory as established by Major League Baseball.

Notwithstanding the facts detailed above, DirecTV has argued that TWC's internal e-mails demonstrate that it considered an exclusive arrangement with the Indians "similar to that negotiated with the Bobcats."¹⁰ To support this claim, DirecTV selectively quotes language

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It should be noted that while the description of the Indians' proposal is attributed to an e-mail from [REDACTED] no citation is given for this e-mail. The only e-mail fitting the description given by DirecTV was from [REDACTED]. More importantly, on its face, this e-mail makes clear that the terms described therein – including prices for both an exclusive agreement and a non-exclusive agreement (with no stated preference for one over the other) – had been proposed by the Indians. Thus, DirecTV is simply wrong in attributing these terms to TWC. It should be noted further that DirecTV's characterization of the e-mail as relating to the "Exclusive Cable License" also is misleading; the "Exclusive Cable License" referenced in the

¹⁰ DirecTV Letter I at 8-9.

¹¹ *Id.*

summary of terms is the exclusive grant of rights from the Indians to the new network, not the grant of exclusive carriage rights to TWC.¹²

Thus, the inclusion of “exclusivity (or non-exclusivity)” in the list of issues in the May 19, 2005 e-mail simply reflects the fact that the Indians had put prices for both exclusive and non-exclusive arrangements on the table. DirecTV’s attempt to make the e-mail appear to be “sinister” is based entirely on its distorted and inaccurate portrayal of the facts. Indeed, the length to which DirecTV apparently is willing to go in distorting the documentation provided by Time Warner is revealed by its misrepresentation of an e-mail from Laure Nordholdt to Terry O’Connell, *et al.* dated May 19, 2005. According to DirecTV,

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[REDACTED] e-mail makes no reference, directly or indirectly, to the issue of exclusivity. Rather, [REDACTED] e-mail simply was a response to [REDACTED] e-mail, which (i) indicated that the time seemed right to move forward with discussions with the Indians; (ii) described some of the issues to be considered in light of the Indians’ proposal; (iii) named a working group for the project; and (iv) asked the recipients of the e-mail to [REDACTED]. The agreement expressed by [REDACTED] in her e-mail undoubtedly was her response to this request regarding the composition of the working group and nothing more.

3. SportsNet New York (“SNY”)

Documents relating to the creation and launch of SNY, a new Sports Programming Network in which Time Warner will have a minority ownership interest, fall within the ambit of Question III. J and, in fact, Time Warner produced numerous SNY-related documents, including several draft agreements. The final versions of these agreements were not provided because they were not completed within the time period covered by the Information Request. Submitted herewith, pursuant to the Second Protective Order, are final versions of the Affiliation Agreement between Sterling Entertainment Enterprises, LLC and TWC, as well as the Second Amended and Restated Limited Liability Company Agreement of Sterling Entertainment Enterprises, LLC (the “LLC Agreement”), and certain related documents.

With respect to the substance the documentation provided, DirecTV points in particular to the “Net Effective Rate” provision in the LLC Agreement.¹⁴ According to DirecTV, the non-

¹² While DirecTV concedes, as it must, that TWC’s carriage agreement with Fastball is non-exclusive, it suggests that the agreement to designate Time Warner Cable Media Sales as the sales agent for commercial time on SportsTime Ohio constitutes a more “subtle” form of discrimination. *Id.* Apparently, any arms-length commercial arrangement that DirecTV does not share in is discrimination, a novel proposition indeed.

¹³ DirecTV Letter I at 9.

¹⁴ DirecTV Letter I at 12-13.

Ms. Marlene Dortch

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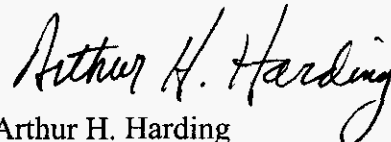
discrimination provision in the program access rules is ineffective because an affiliated network can inflate the price charged to all MVPDs and the "net effective rate" for the affiliated cable operator will still be less because the money is simply transferred from one pocket to the other.¹⁵ DirecTV claims that this "net effective rate" concept was so important in the Mets deal that the parties insisted that the agreement include a provision that would allow TWC or Comcast to withdraw from the venture if the "Net Effective Rate" ever exceeds the "Target Net Effective Rate." Once again, DirecTV's allegations regarding SNY are based on distortions of the record and are without merit.

First, DirecTV has mischaracterized the effect of the "Net Effective Rate" provision. The formula stated in that provision has nothing to do with the amounts paid by TWC for carriage of SNY. Rather, the sole purpose of this clause is to provide an "exit" mechanism from the joint venture. While the precise formulation that such exit triggers might take varies significantly, this general concept is common in programming joint ventures among unrelated parties.

Second, and of greater importance, DirecTV's suggestion that the structure of the SNY joint venture somehow creates an incentive for TWC to impose nominally uniform price increases for the programming to be offered on this channel is contrary to fundamental economics, particularly taking into account TWC's 22% minority interest in the venture. No rational buyer would overpay by a dollar with the hope of receiving a 22¢ rebate down the road.

Please contact the undersigned with any questions regarding the foregoing.

Sincerely,



Arthur H. Harding
Counsel for Time Warner Inc.

Attachments

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¹⁵ *Id.*

Ms. Marlene Dortch

March 2, 2006

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cc: Donna Gregg	Jim Bird
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Tracy Waldon	JoAnn Lucanik
Royce Sherlock	Kimberly Jackson
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